

INDEX

	Page
Opinion below.....	1
Jurisdiction.....	1
Questions presented.....	2
Statute and regulations involved.....	2
Statement.....	2
Argument.....	7
Conclusion.....	11
Appendix.....	12

CITATIONS

Cases:

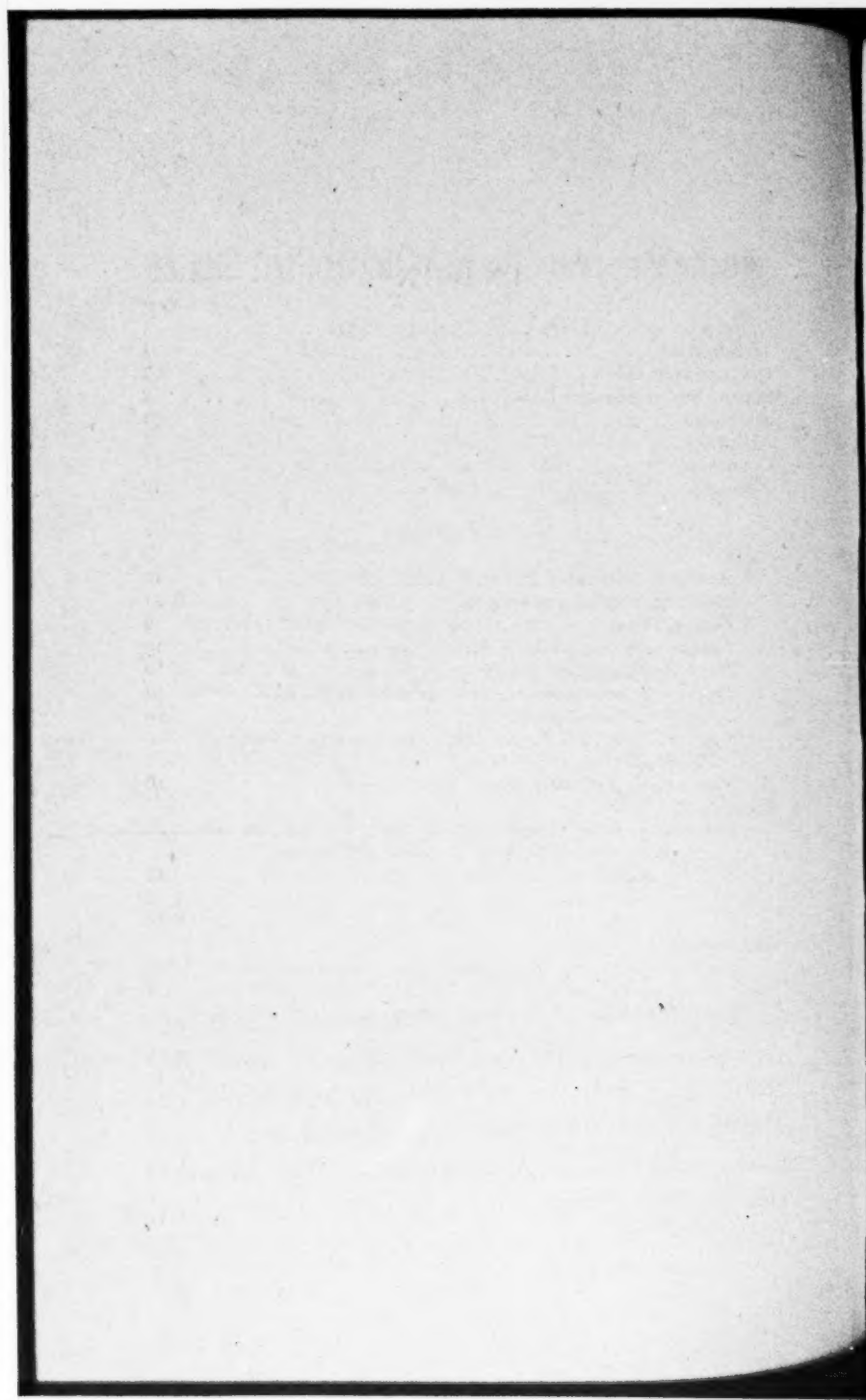
<i>Adams v. Milwaukee</i> , 228 U. S. 572.....	10
<i>Bowles v. Willingham, et al.</i> , 321 U. S. 503.....	10, 11
<i>Fury v. Fleming</i> , E. C. A. No. 380, decided April 2, 1947..	9
<i>Lawton v. Steele</i> , 152 U. S. 133.....	10
<i>North American Cold Storage Co. v. Chicago</i> , 211 U. S. 306..	10
<i>Phillips v. Commissioner of Internal Revenue</i> , 283 U. S. 589..	10
<i>Springer v. United States</i> , 102 U. S. 586.....	10
<i>Victor v. Porter</i> , 157 F. (2d) 769, certiorari denied, <i>Victor v. Fleming</i> , January 6, 1947.....	7, 9
<i>Yakus v. United States</i> , 321 U. S. 414.....	10

Statute:

Emergency Price Control Act of 1942, 56 Stat. 23, as amended (50 U. S. C. App., Supp. V, 901 et seq):	
Section 2.....	12
Section 203.....	4, 13
Section 204.....	11, 15

Regulations:

Rent Regulation for Transient Hotels, Residential Hotels, Rooming Houses and Motor Courts, 11 F. R. 13032.....	2
Rent Regulation for Hotels and Rooming Houses, 8 F. R. 7334:	
Section 4 (a).....	3, 15
Section 4 (b).....	3, 4, 16
Section 5 (c) (1).....	3, 16
Revised Procedural Regulation No. 3, 12 F. R. 1143.....	4
Section 1300.207.....	17
Section 1300.213.....	4, 17
Section 1300.214.....	17
Section 1300.216.....	4, 17



In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1234

A. J. HELFEND

v.

**PHILIP B. FLEMING, TEMPORARY CONTROLS
ADMINISTRATOR**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES EMERGENCY COURT OF APPEALS**

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Emergency Court of Appeals (R. 258-260) is reported in 159 F. 2d 730.

JURISDICTION

The judgment of the Emergency Court of Appeals was entered on February 17, 1947 (R. 261), and a petition for rehearing was denied on March 13, 1947 (R. 267). The petition for certiorari was filed on April 11, 1947. The jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act (50 U.

S. C. App. Supp. V, Section 924 (d)) making applicable Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTIONS PRESENTED

1. Was the petitioner denied due process of law by the rent orders here involved?
2. Does Section 2 (b) of the Emergency Price Control Act require the establishment of maximum rents for hotel accommodations first rented after the maximum rent date in a defense-rental area at a level which will return to an individual landlord his costs of operation?

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended (herein sometimes termed "the Act"), the Rent Regulation for Hotels and Rooming Houses (herein sometimes termed "the Hotel Regulation")¹ and Revised Procedural Regulation No. 3, are set forth in the Appendix, *infra*, pp. 12-18.

STATEMENT

The Rent Regulation for Hotels and Rooming Houses establishes as the maximum rent for a

¹ The Rent Regulation for Hotels and Rooming Houses is now known as the Rent Regulation for Transient Hotels, Residential Hotels, Rooming Houses and Motor Courts. 11 F. R. 13032. Since the Regulation has not been amended in any manner material to the issues involved herein, the provisions set forth are those in effect at the time petitioner's protest was decided by the Price Administrator.

room in a hotel or rooming house in the Los Angeles Defense-Rental Area, the highest rent for each term or number of occupants for which the room was rented or offered for rent during the thirty days ending on March 1, 1942 (Section 4 (a), *infra*, p. 15). For a room neither rented nor regularly offered for rent during that period, but rented or regularly offered for rent prior to November 1, 1942, the maximum rent established is the highest rent for each term or number of occupants for which the room was rented during the 30 days commencing when it was first offered for rent, or if the room was offered for rent but not actually rented for a particular term or number of occupants during that period, the rent for each term or number of occupants for which it was regularly offered. (Section 4 (b), *infra*, p. 16). The maximum rents for petitioner's rooms were initially established pursuant to this latter provision. To prevent excessive rents from being charged for rooms first rented after March 1, 1942, and to put owners of such accommodations in substantially the same position as owners of rooms rented during the "freeze" period, the Regulation authorizes the reduction of the maximum rents for rooms first rented after March 1, 1942 to the level of the rents which prevailed generally for comparable accommodations in the Area on March 1, 1942 (Section 5 (c) (1), *infra*, p. 16). Changes in the maximum rents are effected through proceedings before the local

Area Rent Director. A landlord subject to the Rent Director's order may apply to the Regional Administrator for review, and the Regional Administrator's determination may be protested to the Administrator (Revised Procedural Regulation No. 3, *infra*, pp. 16-18, and Section 203 of the Act, *infra*, p. 13).

Petitioner is the owner of the Helfend Hotel, located at 1231 East G Street, Wilmington, California, in the Los Angeles Defense-Rental Area (R. 2, 57, 61). The rooms in the Helfend Hotel were first rented or offered for rent on July 1, 1942, after the maximum rent date in the Area but before November 1, 1942, the effective date of the Regulation. The first rents for these rooms became the maximum rents pursuant to Section 4 (b) of the Hotel Regulation (*infra*, p. 16). After some delay occasioned, according to the Rent Director, by the petitioner's failure to furnish necessary information, the Rent Director issued a notice of his intention to reduce these rents (R. 120, 81). Petitioner requested a hearing (R. 83). The Rent Director advised petitioner that an oral hearing could not be granted (Sections 1300.213 and 1300.216 of Revised Procedural Regulation No. 3, *infra*, pp. 17-18), but arranged for an oral interview with the express understanding that petitioner would submit his evidence in writing in advance of the interview (R. 105). Petitioner thereupon submitted exten-

sive evidence in his behalf (R. 85-99). On June 23, 1944, the Rent Director, after receipt of petitioner's evidence, but prior to the promised interview, issued an order decreasing the maximum rents for petitioner's housing accommodations pursuant to Section 5 (c) (1) of the Hotel Regulation (R. 100-103). This order affected only the weekly rates. On August 12, 1944, the Rent Director issued a further notice to the petitioner proposing rate reductions (R. 128).² This notice was accompanied by detailed evidence relating to daily, weekly and monthly rates upon which the Rent Director proposed to rely (R. 130-147). After further proceedings, the Rent Director issued an order on September 14, 1944 reducing the daily and monthly rates for petitioner's accommodations and re-establishing the weekly rates effected by the order of June 23, 1944 (R. 178-180). An application was filed for review by the Regional Administrator (R. 150, 191), who, after receiving additional evidence and upon *de novo* consideration of the record, issued an order granting the application in part (R. 180, 194-235).

² The second sentence of the printed notice read: "Therefore, the Rent Director proposes to decrease the Maximum Rent from \$-----". There then followed blank spaces in which were inserted the words: "Refer to pages 8 and 9 of the attached comparability studies-----". Although the pagination of the original notice was not carried over into the printed record, it is clear that the notice refers to the schedules appearing in R. 138-140.

Petitioner then filed a protest with the Price Administrator (R. 1-25). After additional evidence was incorporated into the record, the Administrator, at petitioner's request and pursuant to Section 203 (c) of the Act (*infra*, pp. 14-15), referred the protest to a board of review for its consideration (R. 26-48; 49-53). The board of review recommended that the protest be granted in part only (R. 60-68). The Administrator, upon *de novo* and independent consideration of the record, accepted the recommendation of the board and denied the protest in substantial respects (R. 54-56). The order was accompanied by an opinion setting forth the Administrator's reasons for the action taken. (R. 57-68).

Petitioner thereupon filed a complaint in the Emergency Court of Appeals in which he contended that the maximum rents established by the Administrator are (1) without support in the record, (2) do not permit petitioner to realize his costs of operation, and (3) are predicated upon orders of the Rent Director which were issued without hearing (R. 237-246). The Emergency Court of Appeals dismissed the complaint, holding that (1) petitioner was not prejudiced by any lack of a fair hearing before the issuance of the Rent Director's order of June 23, 1944; (2) there was substantial evidence in the record to support the Administrator's determinations; and (3) petitioner failed to establish that the maximum rents

provided by the Administrator's order do not permit him to realize the cost of operating the hotel, and, in any event, the Regulation does not require the Administrator to consider the factor of costs of operation when reducing petitioner's maximum rents to the level of other comparable rents, and the Regulation is not invalid for that reason.

ARGUMENT

I. Petitioner urges that the Rent Director's orders of June 23, 1944, and September 14, 1944, were void *ab initio* because of the failure to provide petitioner with adequate notice and hearing,³ and that this vice was fatal to the subsequent orders of the Regional Administrator and the Price Administrator.⁴ Even if the premise were correct, that there was a failure to provide adequate notice and hearing, the conclusion that the Price Administrator and his subordinate officials are thereafter rendered powerless to act because of such an initial error on the part of the Rent Director is erroneous.⁵ It is clear that the failure,

³ The validity of these orders *per se* does not appear to be in question since they have been superseded by the Price Administrator's order.

⁴ The questions presented by the petitioner herein, are substantially similar to those presented in *Victor v. Porter*, 157 F. 2d 769, certiorari denied, *Victor v. Fleming*, January 6, 1947.

⁵ It is significant that petitioner does not effectively challenge the adequacy of the hearing in the proceedings before the Regional Administrator and Price Administrator. Indeed, petitioner's comment upon the evidence placed into

if any, of the Rent Director to afford the petitioner a fair hearing before issuing the order of June 23, 1944⁶ did not prejudice the petitioner in either his procedural or substantive rights. In the subsequent proceedings before the Area Rent Director, prior to the issuance of the order of September 14, 1944, the petitioner was given a fair hearing, during the course of which he was afforded abundant opportunity to present evidence in his behalf as well as evidence in rebuttal of that introduced into the record by the Rent Director. Petitioner availed himself of such opportunity (R. 154-170). After full and fair hearing the Rent Director fixed the maximum rents at the levels previously established and, further, established maximum rents for daily and monthly occupancy.⁷ It is also clear that in the

the record by the Regional Administrator was a commendation of the fairness of the Rent Inspector who prepared the evidence; petitioner's disagreement was directed solely to the conclusions reached by the Inspector (R. 225).

⁶ Prior to the entry of the Rent Director's order of June 23, 1944, petitioner was accorded an opportunity to present, and did present, extensive evidence on his behalf (R. 85-99). This evidence is substantially the same as that relied upon by the petitioner at all stages of the proceedings before the Rent Director, Regional Administrator and Price Administrator. Factually, it was substantially the same as that relied upon by the Rent Director (Compare R. 95-99; 159-163 with R. 130-147; See also R. 155), the difference being principally in the evaluation of the facts.

⁷ Even assuming that the order of June 23, 1944 followed an inadequate hearing, the re-affirmance of the rents established by that order after the more complete hearings which preceded the September 13, 1944 order clearly shows that

proceedings before the Regional Administrator and the Price Administrator a fair hearing in the fullest sense was accorded petitioner. Nor does petitioner question the adequacy of those hearings. The determination of the Administrator was reviewed and upheld by the court below. Moreover, it does not appear that any possible failure of fair hearing in the proceedings before the Rent Director could adversely or illegally have affected petitioner's rights as protected by the Fifth Amendment.

Furthermore, it is well settled that the Fifth Amendment does not require a hearing before administrative action is taken, so long as adequate

petitioner was not prejudiced by such inadequate hearings. The established administrative practice of the Administrator, approved and followed by the Emergency Court of Appeals, serves to protect a landlord should it develop that he was prejudiced by a failure to accord him an adequate hearing, Cf. *Victor v. Porter*, *supra*; *Fury v. Fleming*, E. C. A. No. 380, decided April 2, 1947. The Administrator and the Emergency Court of Appeals both found that petitioner was not so prejudiced.

Petitioner further argues that the order of September 13, 1944, which established monthly rates for his accommodation as well as daily and weekly rates, was issued without notice to him of the Rent Director's intention to establish such monthly rates. A fair reading of the notice preceding that order demonstrates the lack of merit in this contention (R. 128). At any rate, petitioner has wholly failed to demonstrate that at any time prior to the issuance of the Regional Administrator's order, he rented his accommodations on a monthly basis at the rates established by that order and was thus prejudiced by the order. In fact, it appears that petitioner's accommodations were rented on a weekly basis only (R. 215).

opportunity is subsequently afforded persons subject to such action to secure review thereof. *Bowles v. Willingham et al.*, 321 U. S. 503; *Yakus v. United States*, 321 U. S. 414; *Phillips v. Commissioner of Internal Revenue*, 283 U. S. 589; *Adams v. Milwaukee*, 228 U. S. 572; *North American Cold Storage Co. v. Chicago*, 211 U. S. 306; *Lawton v. Steele*, 152 U. S. 133; *Springer v. United States*, 102 U. S. 586. In *Bowles v. Willingham*, *supra*, in which an individual landlord sought to enjoin the issuance of an order of a Rent Director reducing a maximum rent found to be excessive, as in this case, this Court held that the judicial review provisions of the Act satisfied the requirements of the Fifth Amendment. Petitioner in this case not only obtained such judicial review, but, in accordance with the provisions of Section 203 of the Act, also obtained administrative review of the Rent Director's orders and a *de novo* determination by the Price Administrator.

2. Petitioner also urges that the Emergency Court of Appeals erred in holding that, under both the Act and Regulation, the Administrator has the authority to reduce maximum rents established after the "freeze" date to the level of rents generally prevailing for comparable accommodations on the "freeze" date, irrespective of the individual landlord's costs of operation. The question thus presented has been effectively answered in *Bowles v. Willingham*, *supra*, upon

the authority of which the court below relied (R. 260).

Petitioner, accepting the authority of the *Willingham* case, nevertheless argues that his costs of operation must be considered because his maximum rents were reduced below the level of rent generally prevailing in the Area on the maximum rent date for comparable accommodations. The court below found that the Administrator's determination of this question of fact was supported by substantial evidence in the record and was neither arbitrary nor capricious within the contemplation of the Act (Section 204 (b), *infra*, p. 15). That finding was correct and the petitioner raises no substantial federal question with respect thereto.

CONCLUSION

The decision of the court below is correct and does not warrant further review. The petition should therefore be denied.

Respectfully submitted.

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MAY, 1947.

APPENDIX

I. The pertinent provisions of the Emergency Price Control Act of 1942 (56 Stat. 23), as amended,¹ (50 U. S. C. App., Supp. V, 901 *et seq.*), are as follows:

SEC. 2. (b) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for

¹ Roman type is used to indicate text which has not been changed since original enactment or issuance and italics are used to indicate amendments.

such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which in the judgment of the Administrator, does not reflect such increases), and he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect to such accommodations, including increases or decreases in property taxes and other costs *within such defense-rental area*.

SEC. 203. (a) *At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections.*² Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the

² As amended by sec. 106 of the Stabilization Extension Act of 1944. At this point the following language was stricken out: "At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days."

Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing,² the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

(c) Any proceedings under this section may be limited by the Administrator to the filing of affidavits, or other written evidence, and the filing of briefs: *Provided, however, That, upon the request of the protestant, any protest filed in accordance with subsection (a) of this section after September 1, 1944, shall, before denial in whole or in part, be considered by a board of review consisting of one or more officers or employees of the Office of Price Administration designated by the Administrator in accordance with regulations to be promulgated by him. Such regulations shall provide that the board of review may conduct hearings and hold sessions in the District of Columbia or any other place, as a board, or by subcommittees thereof, and shall provide that, upon the request*

² As amended by sec. 106 of the Stabilization Extension Act of 1944. At this point the following language was stricken out: "or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later."

*of the protestants and upon a showing that material facts would be adduced thereby, subpoenas shall issue to procure the evidence of persons, or the production of documents, or both. The Administrator shall cause to be presented to the board such evidence, including economic data, in the form of affidavits or otherwise, as he deems appropriate in support of the provision against which the protest is filed. The protestant shall be accorded an opportunity to present rebuttal evidence in writing and oral argument before the board and the board shall make written recommendations to the Price Administrator. The protestant shall be informed of the recommendations of the board, and, in the event that the Administrator rejects such recommendations in whole or in part, shall be informed of the reasons for such rejection.**

SEC. 204. (b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. * * *

II. Pertinent provisions of the Rent Regulation for Hotel and Rooming Houses (8 F. R. 7334):

SEC. 4. *Maximum rents.*—* * * Maximum rents * * * (unless and until changed by the Administrator as provided in section 5) shall be:

(a) *Rented or regularly offered during maximum rent period.*—For a room rented or regu-

* Added by sec. 106 of the Stabilization Extension Act of 1944.

larly offered for rent during the thirty days ending on the maximum rent date, the highest rent for each term or number of occupants for which the room was rented during that thirty-day period, or, if the room was not rented or was not rented for a particular term or number of occupants during that period, the rent for each term or number of occupants for which it was regularly offered during such period.

(b) *First rented or regularly offered after maximum rent period.*—For a room neither rented nor regularly offered for rent during the thirty days ending on the maximum rent date, the highest rent for each term or number of occupants for which the room was rented during the thirty days commencing when it was first offered for rent after the maximum rent date; or, if the room was not rented or was not rented for a particular term or number of occupants during that period, the rent for each term or number of occupants for which it was regularly offered during such period.

SEC. 5 (c) *Grounds for decrease of maximum rent.*—The Administrator at any time, on his own initiative or on application of the tenant, may order a decrease of the maximum rent otherwise allowable, only on the grounds that:

(1) *Rent higher than rent generally prevailing.*—The maximum rent for the room is higher than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on the maximum rent date.

III. Pertinent provisions of Revised Procedural Regulation No. 3 (12 F. R. 1143):

§ 1300.207 *Action by rent director on his own initiative.* In any case where the rent director pursuant to the provisions of a maximum rent regulation, deems it necessary or appropriate to enter an order on his own initiative, he shall, before taking such action, serve a notice upon the landlord of the housing accommodations involved stating the proposed action and the grounds therefor. The proceeding shall be deemed commenced on the date of issuance of such notice.

§ 1300.213 *Oral hearings.* Oral hearings may be requested by either party. The granting of such requests and oral hearings shall be governed by the provisions of § 1300.216 of this regulation. Notice of oral hearing shall be served upon all parties to the proceeding.

§ 1300.214 *Landlords' applications for review in cases not concerning certificates relating to eviction.* (a) Any landlord whose petition for adjustment or other relief, except a petition for a certificate relating to eviction, has been dismissed or denied in whole or in part by the rent director, or any landlord subject to an order entered by the rent director on his own initiative may file with the rent director an application for review of such determination by the Regional Administrator for the region in which the defense-rental area office is located: * * *

§ 1300.216 *Oral hearings—(a) Requests for oral hearing.* Any petitioner or applicant may request an oral hearing. Such request shall be accompanied by a showing as to why the filing of affidavits or other written evidence and briefs will not permit the fair and expeditious disposition of the

petition or application. In the event that an oral hearing is ordered, notice thereof shall be served on the petitioner or applicant not less than five days prior to such hearing. The time and place of hearing shall be stated in the notice. A presiding officer will be appointed with all necessary powers to conduct the hearing. Any such oral hearing may be limited in such manner and to such extent as deemed appropriate to the expeditious determination of the proceeding.

(b) Any landlord subject to any provision of a maximum rent regulation, or of an order issued under § 1300.215 of this regulation, or of an order entered under section 5 (d) of any maximum rent regulation, or of an order entered by the rent director under § 1300.207 of this regulation, may file a protest in the manner set forth below.